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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-825

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

BRIEF OF SHELL OIL COMPANY IN RESPONSE TO THE PETITION OF THE SOLICITOR GENERAL FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission can satisfy the oath and notice requirements regarding the "circumstances" element of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of any specific factual averment

2. Whether a Commissioner of the Equal Employment Opportunity Commission can select a respondent employer as the target of a charge of discrimination under Section 706(b) on an audit basis.

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STATEMENT OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chair and a Commissioner of the Equal Employment Opportunity Commission ("EEOC" or "the Commission"), filed a charge against Shell Oil Company ("Shell"),[1] alleging "across-the-board" discrimination at Shell's Wood

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1. The parent companies and current affiliates of Shell are set out in Appendix A.

River, Illinois refinery.[2] The charge consisted of boilerplate and conclusory allegations of discrimination. It did not allege specific discriminatory practices or incidents; nor did it identify either the period during which alleged discriminatory practices were in effect or the date of any alleged incident of discrimination.

Ms. Norton's charge was not the result of any individual charges filed against Shell, nor of allegations by persons wishing to remain anonymous but, instead, was the result of the activities of the Commission's Office of Systemic Programs ("OSP"). 676 F.2d 322, 325, n.5. *See* Petition at 6. OSP was established in late 1977 for the purpose of developing and initiating EEOC's commissioner's charges alleging systemic discrimination. It began to function in early 1979, at which time OSP personnel were added at EEOC headquarters and district offices and a goal was set of filing approximately 130 systemic charges by the end of 1979. The OSP program does not depend on specific evidence of discrimination in selecting employers as targets of commissioner's charges. For example, the guidelines used by OSP call for the selection of employers who, by reason of expansion or turnover, "are likely to have substantial numbers of employment opportunities and . . . whose practices *may* not provide available minorities and women with fair access to these opportunities." Petition at 41a.

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2. The charge is set forth as Appendix F, pp. 44a-46a, to the Petition for a Writ of Certiorari ("Petition") in this case. Ms. Norton's sworn statement of cause to believe the allegations of the charge is dated September 27, 1979; however, the date of filing was not a matter of record below until the EEOC filed its Petition for Rehearing. Because Shell was not served with notice of the charge until October 26, 1979, EEOC failed to provide notice within the ten day period required by Section 706(b). This fact provides an independent ground for holding the charge invalid.

EEOC served Shell with a copy of the charge and a request for information on October 26, 1979. In response to the request for information, Shell pointed out the following facts pertinent to the charge and the request:

> (a) Within the five years prior to the filing of the commissioner's charge, no charges of employment discrimination on the basis of race or sex had been filed against Shell's Wood River, Illinois refinery.
>
> (b) Within the ten years prior to the commissioner's charge, only two charges of race or sex discrimination had been filed with either the Illinois Fair Employment Practices Commission or the EEOC. Both charges were dismissed.[3]
>
> (c) As of December 31, 1979, the Wood River Refinery employed 1,757 persons, of whom 126 were black and 131 were female. Thus, as of that date, blacks and females constituted 7.2% and 7.5%, respectively, of the total work force at the Wood River Refinery.
>
> (d) As of December 31, 1979, blacks and females constituted respectively 4.7% and 8.0% of the ap-

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3. Over the years 1973-1975, the Department of Interior/Office of Equal Opportunity, the predecessor of the Office of Federal Contract Compliance Programs, conducted a compliance review of Shell's Wood River facility. The review included a desk audit and an on-site investigation. Upon completion of the compliance review, the agency found Shell to be in compliance with Executive Order 11246, which is similar in purpose to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") and which contains not only an anti-discrimination clause but also an affirmative action obligation.

propriate labor market for the Wood River Refinery.[4]

(e) Of the employees at the Wood River Refinery on December 31, 1979, who had been hired by Shell since July 2, 1965 (the effective date of Title VII), 12.3% were black and 9.8% were female.

(f) For the period beginning more than two years before the filing of the commissioner's charge, the hiring rate for blacks and females at the Wood River Refinery significantly exceeded their respective availabilities in the Wood River Refinery labor market. During this same period, promotions of blacks and females at the Wood River Refinery exceeded both the internal work force representation and the external Wood River Refinery labor market availability figures.

(g) The increases in black and female representation in the Wood River Refinery work force occurred despite the fact that the total number of employees at the Refinery declined by 23% over the ten years ending December 31, 1979.

In connection with this presentation to EEOC, Shell sought from EEOC specific information supporting the issuance of Chair Norton's charge so that the company

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4. During the compliance review mentioned in Footnote 3, *supra*, Shell and the reviewing agency reached agreement on the appropriate method for determining "availability" and the appropriate "local labor market" for the Wood River facility. Shell's data in items (c) through (f) were based on this agreed-upon method.

could understand the underlying bases of the charge. With this understanding, Shell could then develop an efficient and economical response to the Commission's request for information. EEOC refused to provide any further information and eventually issued an administrative subpoena to Shell for the documents and data sought in its previous request.

Following its exhaustion of administrative remedies, Shell filed a suit for declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. Shell contended that the charge was invalid as an unauthorized effort by EEOC to conduct an audit of Shell's activities, rather than to investigate any ostensible discrimination. Shell alleged that the charge had failed to provide Shell with adequate notice of the date and circumstances of the alleged discrimination as required by the statute. Based in part on the aforementioned employment data, Shell also questioned EEOC's compliance with the oath requirement and thus the validity of the charge. In support of its complaint Shell sought limited discovery directed to the issue of whether EEOC was conducting an unauthorized audit.

On Shell's appeal from the district court's order denying Shell's discovery against EEOC and enforcing EEOC's subpoena against Shell, the Eighth Circuit held that the commissioner's charge in issue failed to provide a factual basis for the Commissioner's belief and adequate notice of the date and circumstances required by Section 706(b). 676 F.2d at 325-26. The court of appeals remanded the case to the district court to give EEOC an opportunity

to amend the charge to comply with the requirements of Section 706(b). 676 F.2d at 326.[5]

The court of appeals noted that the parties did not dispute that providing the name and address of the plant at which the alleged practices occurred satisfied the "place" requirement. 676 F.2d at 325, n.4. However, following earlier decisions in *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1337-38 (9th Cir. 1980), and *EEOC v. K-Mart Corp.*, 526 F. Supp. 121, 125 (E.D. Mich. 1981), *vacated on other grounds*, ____F.2d____ (6th Cir. December 8, 1982), the Eighth Circuit held that EEOC's use of July 2, 1965—the effective date of Title VII—as the "date" element in the charge did not "give notice to the employer of the parameters of the investigation." 676 F.2d at 325.[6] As to the "circumstances" element, the court of appeals went on to hold:

> . . . [S]ection 706(b) requires a statement of the circumstances of the alleged unlawful practices. As with the date requirement, we read this to require the statement of circumstances to be supported by some factual or statistical basis.

676 F.2d at 325-26.

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5. Shell contends that an EEOC commissioner's charge cannot be amended once the Commissioner has left office. Neither party briefed this issue to the district court or the court of appeals. However, in its Petition for Rehearing EEOC stated, "It is far from clear whether Title VII authorized technical amendment of a former commissioner's charge by either the former commissioner or by a sitting commissioner." Petition for Rehearing at 15.

6. On January 16, 1981, after the decision in *Dean Witter, supra*, Ms. Norton amended her charge against Shell to allege that she had "reason to believe that the named employer [Shell] had engaged in the identified unlawful employment practices from at least July 2, 1965 until the present." *See* Petition at 47a.

The words "or statistical" in the passage quoted above were added by the Eighth Circuit among its modifications of the opinion after consideration of EEOC's Petition for Rehearing. In that Petition for Rehearing, EEOC claimed *for the first time* that Ms. Norton's charge against Shell was based on statistical information and not on any individual complaint or charge of discrimination. In light of EEOC's Petition for Rehearing—*to which Shell was not permitted to respond*—the Eighth Circuit modified its opinion to imply that a commissioner's charge could be based on statistics developed by EEOC itself. However, the court of appeals held that "the basic information that the charge is based on statistical data and the general nature of that data, including dates, should be disclosed in the charge." 676 F.2d at 325-26, n.5.

Subsequent to the filing of the EEOC's Petition, the Sixth Circuit issued an opinion in *EEOC v. K-Mart Corp.*, Nos. 81-1722, 82-1909 (6th Cir. December 8, 1982) in which it stated:

> We do not agree, however, with the Eighth Circuit's holding in *Shell Oil* that section 706(b) requires "some basis in fact." That holding is contrary to well-established law. In subpoena enforcement proceedings, the EEOC usually does not have to prove probable cause or reasonable cause to believe that a charge of discrimination is true. *See, e.g., EEOC v. Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977); *EEOC v. South Carolina National Bank*, 562 F.2d 329 (4th Cir. 1977); *EEOC v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Graniteville v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971). A charge of discrimination merely allows the EEOC to begin an investigation.

> The purpose of that investigation, however, is to determine whether probable cause or reasonable cause to bring a discrimination charge exists. *See, e.g., EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981); *Chrysler Corp.*, 567 F.2d at 755; *Graniteville*, 438 F.2d at 36.

Id., slip opinion at 15, n.7. This language is dicta. The sufficiency of the charge in *K-Mart* was not in issue and, therefore, this point was neither briefed nor argued. Although the language in *K-Mart* concerning the sufficiency of a charge is dicta, it is likely that all federal district courts in the Sixth Circuit will be inclined to give the dicta considerable weight. Moreover, such dicta creates a potential conflict among the circuits concerning the statutory requirements of oath and adequate notice.

SUMMARY OF ARGUMENT

1. The Eighth Circuit decided in this case that the clear statutory directive of Section 706(b) requires EEOC to provide a respondent employer with adequate notice of the circumstances upon which a commissioner's charge is based. The court of appeals did not require the Commission to establish "probable cause," as the Sixth Circuit contended in *K-Mart;* nor did the Eighth Circuit impose "technical" or "hypertechnical" pleading requirements, as the *Dean Witter* court feared. It simply provided that the charge must state the facts which the Commissioner relied upon for filing the charge.

Ordinarily, such a decision would not merit review on a writ of certiorari. However, this case arises in the context of a newly-established EEOC program of auditing large employers. Three circuit court decisions have ad-

dressed the adequacy of notice provided by the Commission in issuing these charges. All three have agreed that the "date" requirement of Section 706(b) must be specifically addressed in the notice. The Eighth Circuit, in this case, has also held that the "circumstances" requirement must be similarly addressed. The Ninth Circuit, in *Dean Witter*, and the Sixth Circuit, in *K-Mart* (dicta), have disagreed. These pronouncements represent at least a potential divergence among circuits. Accordingly, Shell acquiesces in the Petition for Certiorari for the purpose of determining whether the oath and notice requirements regarding the "circumstances" element of Section 706(b) can be satisfied in the absence of any specific factual averment. In considering these requirements, this Court should also clarify the directive of the court of appeals below with respect to the extent to which the source and use of statistical data must be set forth in the charge or notice. This Court should also consider whether discovery of the bases for a charge may be permitted where the validity of the charge is in question.

2. If the Petition is granted, this Court should also consider, and decide, whether EEOC is authorized to conduct investigative audits. In this respect, Shell contends that, under Title VII, EEOC's authority to investigate is far more limited than the authority vested in other federal agencies.

3. The remaining arguments advanced by the Solicitor to justify the grant of a writ are without merit:

(a) Other than the limited divergence between this case, on the one hand, and the *K-Mart* and *Dean Witter* cases on the other, the remaining cases cited by the Solicitor are distinguishable.

(b) Section 706(b), rather than providing *carte blanche* to the Commission to launch investigations, provides EEOC authority to investigate only where there is a valid charge. Section 706(b) establishes specific requirements for a sufficient and valid charge which the Commission may not ignore. Nor may the Commission override the statutory safeguards through its own regulations or interpretations of the statute.

(c) The Solicitor's argument that EEOC has sole responsibility for determining the sufficiency of a charge is incorrect. Where the EEOC seeks enforcement of a subpoena and the respondent challenges the sufficiency or validity of the charge upon which the subpoena is based, a federal court has the responsibility for determining whether a charge meets the statutory requirements.

(d) The Eighth Circuit's decision did not impose a "pleading requirement" but merely gave effect to the language of the statute. Its decision is consistent with the 1972 amendments to Title VII.

(e) The Solicitor's belated attempt to inject the *Socal* decision into this case must be rejected. In all the subpoena enforcement cases cited by the EEOC below and by the Solicitor here, not a single one suggests that the subpoenaed party is precluded from making the very kinds of arguments that Shell made here as to the legal authority of the agency to issue the subpoena and the relevance of the materials sought. In addition, the Solicitor's attempt to equate Federal Trade Commission administrative complaints with the Title VII charge requirement at issue here misses the mark.

ARGUMENT

I. Review By This Court Is Merited In Order To Clarify The Oath And Notice Requirements Relating To The Circumstances Element Of Section 706(b)

In the decision below, the Eighth Circuit held that the charge in issue had failed to provide adequate notice of the "date" and "circumstances" as required by Section 706(b) of Title VII. The court of appeals stated that a respondent employer must have notice of the "approximate dates of the unlawful practices" alleged, including an "approximate beginning date." 676 F.2d at 325. Use of the effective date of Title VII would not satisfy the requirement of providing "notice to the employer of the parameters of the investigation." 676 F.2d at 325. In addition, the notice must provide "some factual or statistical basis for the charge. 676 F.2d at 326. If the charge is based on statistical data, "the general nature of that data, including dates, should be disclosed in the charge." 676 F.2d at 326, n.5.

This case would not ordinarily be suitable for review by this Court. However, as noted above, the case arises in the context of the recently instituted systemic program under which EEOC generates commissioner's charges against employers based on its own studies of factors (such as its own projected availability of future vacancies) which may be wholly unrelated to the existence of any discriminatory employment practices. The question of the adequacy of such charges is likely to recur. If the Court accepts this case for review, it can provide guidance as

to the oath and notice requirements of Section 706(b) which may obviate much future litigation.

In addition, there is a disparity between the Eighth Circuit's holding in this case and the positions taken by two other circuits concerning the "circumstances" requirement of Section 706(b). The courts in the *Dean Witter* and *K-Mart* cases both held, as did the court of appeals below, that the "date" requirement of Section 706 requires the Commission to disclose the dates of the alleged discriminatory practices.[7] However, the *Dean Witter* and *K-Mart* courts failed to recognize that requiring a specific "date" alone gives little notice without a statement of the specific incidents or employment practices alleged to be discriminatory. For that reason, both courts mistakenly rejected the position adopted by the Eighth Circuit, that there must be at least a minimum statement of the factual basis of the charge to satisfy the "circumstances" requirement.

The recent *K-Mart* decision, which criticizes in dicta the Eighth Circuit's decision here, mischaracterizes it as one which requires the EEOC "to prove probable cause."

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7. *EEOC v. Dean Witter Co., Inc., supra*, at 1338 (9th Cir. 1980); *EEOC v. K-Mart Corp., supra*, slip op. at 15. The Solicitor argued that the use of the effective date of Title VII (July 2, 1965) is not unreasonable in a charge of systemic discrimination and therefore can, in such charges, satisfy the standard set by the *Dean Witter* court. Petition at 9. The Ninth Circuit in *Dean Witter*, the Eighth Circuit in *Shell*, and the Sixth Circuit in *K-Mart*, however, have held that a good faith estimate of the dates of alleged discrimination is necessary in order to provide the district court, the respondent, and the agency itself an "objective basis to determine the temporal scope of the investigation." *K-Mart*, slip op. at 15. Among other considerations the scope of the investigation defines the extent of relevant and material evidence to which EEOC may gain access by a subpoena. The boilerplate use of the effective date of Title VII in every case (*see K-Mart*, slip op. at 18) cannot satisfy that requirement.

Slip op. at 15, n.7. Similarly, the earlier *Dean Witter* decision rejects the notion of a "pleading" requirement. 643 F.2d at 1338. These concerns fail to recognize that the purpose behind an adequate notice requirement is to assure the statutory requirements for a valid charge are met and that the charge is not an abuse of governmental authority.

The Sixth and Ninth Circuits appear to believe that a requirement of a factual basis of a charge will limit EEOC's ability to conduct an investigation by locking it into a specific set of allegations at the outset. Such a fear is groundless. It is well-established in Title VII law that the EEOC may pursue the investigation and conciliation of any matter reasonably arising out of its investigation of the original charge. *EEOC v. General Electric Co.*, 532 F.2d 359, 366 (4th Cir. 1976); *EEOC v. E.I. du-pont de Nemours & Co.*, 373 F. Supp. 1321, 1335 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). The Eighth Circuit's construction of the "circumstances" requirement would in no way limit the Commission's ability to subpoena significant information as new subjects of investigation arose. Rather, like the date requirement, it provides a basis for a court to determine the sufficiency and validity of a charge in the course of determining the relevance and materiality of a subpoena based on the charge.

Given the language of the recent *K-Mart* decision and the potential for some divergence among the circuits with respect to the "circumstances" requirement of Section 706(b), Shell acquiesces in the Petition for Certiorari insofar as it seeks review of the holding below with

respect to that requirement. No such divergence presently exists with respect to the "date" requirement and Shell accordingly opposes review with respect to that issue.

In adition to resolving the question of whether the "circumstances" of alleged discrimination must be set forth in a commissioner's charge, this Court should also clarify the notice to be provided if statistical data have been used to support a charge. After consideration of EEOC's Petition for Rehearing, the Eighth Circuit modified its opinion to address the EEOC's contention that many commissioner's charges were based on statistical analysis performed by the Commission. The court of appeals reiterated that the basis of the charge must still be set forth, but did not provide guidance as to the level of detail that must be provided.[8] If this Court grants the Petition for Certiorari, it should address this point.

The use and utility of statistics in Title VII cases varies widely, so if a rule can be stated, it must be stated in

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8. EEOC appears already to be trying to evade the purpose of those standards by a superficial compliance. A prime example is EEOC's recent amendment to a previously filed charge against another company to cure the possible deficiencies of the original charge in light of the Eighth Circuit's decision in *Shell*. The original charge was similar in its general and conclusory nature to that filed against Shell. The commissioner's amendment merely added the following:

> 1. Information regarding the employer and other relevant information were reviewed applying the approved Commission standards for the selection of subjects for systemic discrimination proceedings.
>
> 2. Statistical data contained in the employer's EEO-1 reports available for periods since at least 1973 when compared to measures of availability in the relevant labor market area indicate a continuing pattern of unlawful employment practices against blacks, Hispanics, and women as cited in this charge.

Such an amendment provides no guidance to the respondent or a court reviewing the validity of a charge or the scope of relevance and materiality of a subpoena.

general terms. To give fair notice to the respondent employer and to prevent abuse of authority, the following elements appear to be minimally necessary: (a) the source(s) of the statistics, (b) the date(s) of the statistics, (c) identification of the labor market used to determine the availability data and the source(s) of that data,[9] and (d) how the statistics have been analyzed to lead to the conclusion that the charged party may have violated and/or be violating Title VII.

Such a requirement would work no burden on the Commission, which will have already performed the analysis. Indeed, the Commission has *sua sponte* provided the same or similar data in the past. *New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160, 163 (5th Cir. 1975). Nor will it be necessary to disclose proprietary data provided by other employers, except in rare cases as to which disclosure safeguards can be fashioned.[10]

Requiring the minimum disclosure outlined above in cases where a commissioner's charge is supported by statistics should, however, provide the statutorily required notice to the respondent. It will also enable a reviewing court to determine the statutory validity of a charge as well as whether a subsequent subpoena issued by the Commission seeks information which is relevant and material.

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9. The general description "availability in the relevant labor market area" used in a recent amendment to a commissioner's charge (*see* n. 8 *supra*) is useless without a specification of the labor market used by the Commission as well as the date and source of statistics about the labor market.

10. The Eighth Circuit provided for similar safeguards in the case of charges based on complaints of individuals wishing to remain anonymous. 676 F.2d at 326.

II. If The Court Grants The Petition, It Should Also Consider Whether EEOC Has Authority To Issue Commissioner's Charges As A Device For Auditing Employers

Shell argued below that the selection of its Wood River Refinery as the target of a commissioner's charge represented application by EEOC of an audit approach not authorized by Title VII. Although the court of appeals indirectly provided some safeguards against the use of audit techniques by requiring EEOC to articulate the factual basis for its charge, it did not address the issue.

EEOC belatedly asserted in its Petition for Rehearing below that Chair Norton's charge was based on unspecified statistical studies. However, it did not reveal what those studies were or how they relate—if at all—to Shell's actual employment practices. As set forth earlier, availability data developed using the method specifically approved by the federal compliance review agency show that Shell's representation, rates of hiring, and rates of advancement for blacks and women were at or above availability levels.[11] For those reasons, it appears likely that the Commission's alleged "statistics" would not have justified a charge and that the charge was based on factors that were not related to Shell's employment practices.

From EEOC's perspective, the refinery was a large facility, in what was then regarded as a flourishing industry, and was located in a district in which it was neces-

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11. *See* 3-4 *supra*. The broad-brush approach of Ms. Norton's charge casts doubt on whether it could have been filed in good faith. For example, Shell is unaware of any statistics that would bear on Shell's testing practices, much less provide the basis for a charge. It seems that "testing" has been thrown into the charge simply to complete a litany.

sary to bring a charge.[12] If these external factors accounted for the charge, then the charge constituted an attempt to conduct a full-scale fishing expedition. Shell submits such an action is beyond a Commissioner's statutory authority and is an abuse of governmental power.

Shell contends that EEOC's authorized activities are carefully defined and circumscribed by Title VII and do not include audit investigations.[13] EEOC was created to investigate and conciliate alleged discrimination brought by and on behalf of employees, not to review employers *ad libitum* for the purpose of attempting to discover a claim. For that reason, Congress provided that a charge —"including the date, place and circumstances of the [alleged] unlawful employment practice"—was an essen-

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12. Since Shell has never been granted discovery, it may only speculate as to the reason for the charge. One goal of the OSP was to generate a number of systemic charges from each EEOC district office. To this end, EEOC had assigned personnel and equipment to its St. Louis district office. Under these conditions, it was predictable that an employer would be selected as a target by the district office. Likewise, in order to justify the resources expended, the facility targeted would have to be relatively large. Finally, in order to gain leverage to advance the employment of women and minorities, the district office would seek a facility perceived to operate in a flourishing economic sector. Compared to these concerns, Shell's record of non-discriminatory employment practices (as evidenced by the employment data and a remarkable absence of charges, *see* 3-4 *supra*) apparently was unimportant to OSP.

13. Shell does not contend that EEOC may not consider employment statistics or extraneous factors, such as the size of a respondent's workforce, in deciding how to allocate its investigative resources among respondents, or even in selecting one among several possible employers as the target of a commissioner's charge. However, such external factors must supplement an existing factual basis for a charge of discrimination. They cannot be the predominant reason for a charge, nor can they provide a sufficient factual basis in and of themselves.

tial prerequisite to Commission investigations.[14] The principal legislative spokesmen for Title VII were careful to emphasize the limited nature of EEOC's authority:

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the *Commission's investigatory power is significantly narrower than that of the Federal Trade Commission*, 15 U.S.C. 43, 46, *or of the Wage and Hour Administrator*, 29 U.S.C. 211, *who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing.*

Interpretative Memorandum on Title VII of Senators Clark and Case, Legislative History of Title VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W. S. Hein & Co.) at 3045 (emphasis added).[15]

As stated above, the EEOC, like the NLRB, is not an audit agency but is required to respond to actual claims of discrimination.[16] If it grants certiorari in this case, this Court should clarify that EEOC is not authorized to use a commissioner's charge to initiate an audit. In particular, present OSP criteria alone do not support a good faith

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14. Section 706(b). In this respect, EEOC functions in a manner similar to the National Labor Relations Board ("NLRB"). The NLRB also has no audit authority, but is authorized to conduct an investigation only when an individual charges that an unfair labor practice has occurred. 29 U.S.C. §§ 160(b), 161.

15. *See Graniteville Co. (Sibley Div.) v. EEOC*, 438 F.2d 32, 38.

16. Unlike the National Labor Relations Act ("NLRA"), Title VII permits the Commissioners of EEOC to file a charge. However, a commissioner's charge must, nonetheless, meet the oath and notice requirements of Section 706(b).

belief that a targeted employer is engaging in discriminatory employment practices. Shell contends that the limitation of EEOC's investigative activities to its statutorily authorized functions and allowance of discovery to employers where the validity of a charge is in question will largely prevent the need to litigate the adequacy of future commissioner's charges.

III. The Remaining Arguments Proffered By The Solicitor In Support Of His Petition Are Without Merit

A. The cases cited by the Solicitor to show inconsistency among the circuits are distinguishable

As Shell has stated above, there is a limited disparity between the Eighth Circuit's decision in this case and those of two other courts of appeals with respect to the "circumstances" requirement of Section 706(b).[17] In light of that disparity, review by this Court is warranted to clarify the oath and notice requirements relating to the "circumstances" element of Section 706(b).

The Solicitor attempted to show an inconsistency between the Eighth Circuit's decision and cases decided by "at least" six other circuits.[18] Of the cases cited by the Solicitor, the following involved commissioner's charges which were filed prior to the effective date of the 1972 amendments to Title VII:[19]

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17. *See* 12-14 *supra*.

18. Petition at 9-14. In addition, the Solicitor attempted to argue an inconsistency with respect to the interpretation of the "date" requirement by the Ninth Circuit as compared to the Eighth Circuit. As shown at n.7 *supra*, this argument is incorrect.

19. Public Law 92-261, March 24, 1972.

> *New Orleans Public Service, Inc. v. Brown, supra; Sparton Southwest, Inc. v. EEOC*, 461 F.2d 1055 (10th Cir. 1972) (*en banc*); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.), *cert. den.*, 400 U.S. 942 (1970).

On the bases of the facts and applicable law, these cases are distinguishable from the instant case.[20] None of these cases reflects the total absence of an individual charge such as exists in the instant case. Each of these cases predates not only the establishment of the audit techniques of EEOC's systemic targeting program but also the 1972 amendments to Title VII.

Prior to the effective date of the 1972 amendments, Section 706(a) of Title VII provided:

> Whenever . . . a written charge has been filed by a member of the Commission where he has *reasonable cause to believe* a violation of this title has occurred (and such charge sets forth the facts upon

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20. The charge in *New Orleans Public Service, Inc. v. Brown* was based on discrimination charges by no fewer than six individuals. Moreover, parts of the charge were bolstered by explicit statistical data set forth in the body of the charge itself. In *Sparton Southwest, Inc. v. EEOC*, the charge was limited to three items: failure to recruit and hire minorities, restriction of occupational categories to exclude minorities, and maintenance of separate job classifications based on sex. In *General Employment Enterprises, Inc. v. EEOC*, the charge was limited to refusal to hire Negroes and Jewish people. In *Bowaters Southern Paper Corp. v. EEOC*, only three violations were charged: maintenance of racially restricted job classifications, discriminatory use of tests to restrict Negro employees to lower paying jobs, and denial to Negro employees of opportunities to participate in apprenticeship and training programs.

> which it is based) . . . the Commission shall furnish [the charged party] with a copy of such charge.

42 U.S.C. § 2000e-5(a) (1970) (emphasis added).

In 1972, Congress revised the statutory provision to its present form (in Section 706(b)):

> Whenever a charge is filed . . . by a member of of the Commission, alleging that [the charged party] . . . has engaged in an unlawful employment practice, *the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practices)* on [the charged party] . . . within ten days, and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation* and shall contain such information and be made in such form as the Commission requires.

42 U.S.C. § 2000e-5(b) (1976) (emphasis added).

The 1972 amendments are significant because they require a commissioner's charge (a) to be under oath and (b) to provide notice of the "date, place, and circumstances" of the alleged violation. If the oath requirement is to have significance, the charge must contain statements susceptible of proof. In a sworn statement of belief, additional allegations as to the source of the affiant's information and the grounds for his belief are essential to permit the judicial mind to determine whether such belief is well- or ill-founded. 3 Am. Jur. 2d *Affidavits* § 22 (1962 2d ed.).[21] The notice requirements were

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21. *See also, Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 354-56 (D.C. Cir. 1949); *United States v. Zagari*, 419 F. Supp. 494, 504 (N.D. Cal. 1976). Since the charge in issue admittedly was based on statistics, it could not be based on personal knowledge, but rather belief. As such, it would need to disclose grounds for the belief to make the oath meaningful.

added by the 1972 amendments "to protect fully the rights of the person or persons against whom the charges are filed," S. Rep. No. 92-415, p. 25 (1971), and "to give [the charged party] an opportunity to gather and preserve evidence in anticipation of a court action."[22] *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 372 (1977). As the court of appeals noted, a commissioner's charge must have some factual specificity to meet the purposes of this notice requirement. 676 F.2d at 326, n.6. For the above reasons, the standard applied to commissioner's charges filed prior to the effective date of the 1972 amendments is not applicable to a commissioner's charge filed thereafter.

The Solicitor also cited *Graniteville Co. (Sibley Div.) v. EEOC*, *supra*, to suggest an inconsistency among the circuits. *Graniteville* involved a charge filed by an individual which (in sharp contrast to the charge in the instant case) was rather specific in alleging discrimination in promotion policies; harassment of Negro employees; segregation of concession stands, locker and toilet facilities; and maintenance of job categories. The court first adopted the employer's position that EEOC is without jurisdiction to proceed with an investigation in the absence of a valid charge. 438 F.2d at 35. The court then concluded that the charge at issue there met the specificity requirements of the 1964 statute. In reaching its conclusion, the court stressed that lay complainants, like the charging party in the case, "are unfamiliar with the niceties of pleading, and nearly always are without the assistance of counsel." *Id.* at 37. It elaborated that "sophisticated general policies

22. EEOC regulations require respondent employer to "preserve all personnel records relevant to the charge or action." 29 C.F.R. § 1602.14(a).

and practices of discrimination are not susceptible to . . . precise delineation by a layman . . . ." *Id.* at 38. By contrast, the court noted that Congress had meant to control "fishing expeditions" by the Commission by requiring a charge-filing Commissioner to acquire "sufficient prior information to have reasonable cause to believe that a statutory violation had occurred." *Id.* at 41. In this context, *Graniteville* does not support the Solicitor's position that the law authorizes a boilerplate commissioner's charge which has no purpose other than the initiation of a fishing expedition by EEOC's OSP.

The last case cited by the Solicitor, *Dean Witter,* has been sufficiently discussed and distinguished previously. *See supra* at 12-13 and 12, n.7.

B. Section 706(b) limits the Commission's authority to launch investigations

The Solicitor next argued that the purpose of a charge is merely to initiate an administrative investigation and that the "pleading requirement" imposed by the Eighth Circuit interferes with the smooth functioning of that investigation. By this argument, the Solicitor dismissed out of hand the statutory provision at issue in this case. Had Congress intended the charge simply to initiate an investigation, it would not have required the charge to be under oath, nor required the Commission to provide notice of the "date, place and circumstances" of the charge. Rather, Congress established these requirements as part of an overall intention to create EEOC as an agency to respond to charges filed under Section 706(b), not with plenary authority to investigate matters of its own unfettered choice.[23]

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23. *See* 18 *supra.*

The Solicitor's argument that generally worded charges are acceptable in the NLRB context, and hence should be acceptable in Title VII practice, is incorrect. While the NLRA did serve as a model for Title VII, that Act does not require that charges be under oath or that notice of date, place and circumstances be provided the respondent.[24] Moreover, the cases cited by the Solicitor to support his argument that "generally worded" charges are acceptable in NLRB practice contradict his argument. The charges in cases such as *NLRB v. Fant Milling Co.*, 258 F.2d 851, 854, n.6, n.7 (5th Cir. 1958), *rev'd*, 360 U.S. 301 (1959) and *Gulf State Manufacturers, Inc. v. NLRB*, 579 F.2d 1298, 1301-02 (5th Cir. 1978) are far more specific than the boilerplate accusations which the Solicitor defends in this case.[25]

C. EEOC does not have sole responsibility for determining the sufficiency of a charge; a charge must meet the statutory requirements.

As his third reason for review, the Solicitor asserted that because Section 706(b) provides that "charges . . . shall contain such information and be in such form as the Commission requires," the court below should have deferred to the Commission's determination of the sufficiency of the charge. This contention is incorrect for two reasons.

First, while EEOC may have primary responsibility for determining the sufficiency of a charge, it does not

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24. *Compare* 29 U.S.C. § 160(b) *with* Section 706(b) of Title VII.

25. In addition, the NLRB has no equivalent of commissioner's charges and no "systemic" program such as gave rise to the charge in this case.

have sole responsibility. A federal district court has a responsibility for determining the sufficiency of a charge whenever EEOC seeks the court's powers to enforce a subpoena[26] and the respondent challenges the sufficiency or validity of the charge upon which the subpoena is based. To avoid abusing its authority by enforcing a subpoena based on an invalid charge, the court must determine the sufficiency and validity of the charge.[27]

Second, in determining the sufficiency of a charge, not only the court but also EEOC must observe the statutory requirements for a charge. EEOC may not take one sentence out of the entire context of Section 706(b). The Eighth Circuit's decision in this case is an entirely proper construction of the statute by a court constitutionally authorized to do so.

Even if the Solicitor's argument were otherwise meritorious, it must be recognized that EEOC regulations require each charge to contain:

> . . . a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . . .

29 CFR § 1601.12(a)(3).

The Solicitor attempted to avoid the impact of this regulation by pointing out that the regulations also provide:

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26. Unless a charged party voluntarily provides information requested by EEOC, EEOC must issue a subpoena to investigate a charge. EEOC does not have the authority to issue a self-enforcing subpoena. Rather, if the subpoena is not voluntarily complied with, EEOC must obtain enforcement of a subpoena through a federal district court. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(2).

27. *See United States v. Powell*, 379 U.S. 48, 58 (1964).

> . . . a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.

29 CFR § 1601.12(b).

The Solicitor contended that this latter regulation governs the sufficiency of a commissioner's charge. However, the obvious purpose of Section 1601.12(b) is to provide latitude for incomplete charges filed by unsophisticated individuals, not to shield commissioner's charges from the regulations. Moreover, in the case of an individual claim, an employer will have less difficulty in determining the facts underlying the charge simply by reviewing the charging party's personnel file or other records of the charging party's contacts with the respondent.

EEOC's authority to determine the "form" of a charge does not limit the effect of the statutory notice requirement. As this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980):

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretations" of the statute cannot supersede the language chosen by Congress.

Id. at 825.

D. The decision below did not establish a pleading requirement inconsistent with Section 706(b)

The Solicitor next asserted that the decision below established pleading requirements which Congress specifi-

cally rejected when it enacted the 1972 amendments. This assertion is incorrect.

The decision below did not establish "pleading requirements." It simply gave effect to the oath and notice requirements of Section 706(b). Certainly, a charge under Title VII is not to be compared to a complaint under the Federal Rules of Civil Procedure. The charge does not frame the issues in litigation, nor does it require an answer from the respondent. It does not reduce the ability of the Commission to expand the scope of its investigation or of an ultimate determination in light of matters that arise out of the charge as initially filed. The term "pleading requirement" is simply inapplicable and, instead, is a piece of jargon used in place of analysis. The real question is whether the Eighth Circuit correctly construed the plain language of Section 706(b).

The standards established by the decision below are consistent with the 1972 amendments. As stated previously, the 1972 amendments (a) replaced the former "reasonable cause to believe" standard of Section 706(a) with the significantly more stringent standard that commissioner's charges be under oath and (b) required notice to be given of the date, place, and circumstances of a charge. *See supra* at 21-22.

E. The Solicitor's reliance on the *Socal* case is misplaced

The Solicitor, for the first time in these proceedings, cited the case of *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (*"Socal"*), as supporting the argument that Shell should not have been permitted to raise the adequacy of the underlying charge or notice as a defense to subpoena

enforcement proceedings.[28] Not a single case cited in the Petition supports the contention that the adequacy of the charge cannot be raised as a defense in subpoena enforcement actions.

This Court in *Socal* did hold that the investigation therein was not subject to review on Socal's complaint because the investigation was an administrative proceeding. Socal's complaint was that there were events which suggested the FTC had not met the standard for its authority in that case, which was a "reason to believe" Socal had violated the FTC Act. In *Socal*, however, there was an absence of a concrete controversy such as is involved in a subpoena enforcement proceeding. In light of these circumstances, this Court held that Socal could not disrupt an ongoing administrative proceeding to attack the FTC's compliance with the standard.

In contrast, the district court in the instant case had a duty to assess the validity of the charge. Since EEOC can issue a subpoena only on the basis of an adequate charge, and the subpoena is not self-enforcing, the validity of the charge becomes subject to review by a district court. This proceeding would be similar to the review conducted by the Eighth Circuit in this subpoena enforcement case.

Moreover, Congress deliberately withheld from EEOC the broad investigative powers it had conferred on the Federal Trade Commission. *See* 18 *supra*. Thus, an admin-

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28. In the district court and court of appeals below, EEOC, citing *Socal*, had argued that Shell should not be permitted to maintain a pre-enforcement action attacking the charge prior to the Commission's institution of subpoena enforcement proceedings. Whatever the merits of the argument, it was effectively mooted when EEOC brought its subpoena enforcement action and the two cases were consolidated.

istrative complaint before that agency and a charge filed with EEOC under Title VII do not represent identical "threshold determinations." Congress has set a much higher standard for Title VII charges, and a district court may well scrutinize the charge to determine if those standards have been met when the Commission invokes its assistance.

CONCLUSION

For the reasons stated above, Shell acquiesces in the Petition to the extent that it seeks this Court's review of the oath and notice requirements relating to the "circumstances" element of Section 706(b). Shell opposes the Petition to the extent it seeks review of the court of appeals' holding with respect to the "date" element since the decision below is in accord with the decisions of both of the other courts of appeals that have considered the issue. If this Court grants the Petition, its review should encompass the subsidiary question: Whether EEOC has authority to launch an investigation that is merely an audit of employment practices.

Respectfully submitted,

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Dated: January 19, 1983

APPENDIX A

Parent Companies and Affiliated Companies
of
SHELL OIL COMPANY

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Business Development Corporation of North Carolina
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Capital Corporation
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal, N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Gravcap, Inc.
Heat Transfer Research Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution
Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Ltd.
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company